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No. 157

In the Supreme Court of the United States

OCTOBER TERM, 1969

VALLEYDALE PACKERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a–9a) is reported at 402 F. 2d 768. The Board's decision and order (Pet. App. 12a–36a) are reported at 162 NLRB 1486.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1968, and a petition for rehearing was denied on February 26, 1969 (Pet. App. 10a–11a). The petition for a writ of certiorari was filed on May 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that a successor employer had no valid basis for doubting that the union continued to represent a majority of the employees, and that he was thus obligated to bargain with it.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the petition (pp. 3–5).

STATEMENT

On December 5, 1963, Tobin Packing Company recognized the Union [1] as the exclusive representative of its Miami, Florida, employees, after an arbitrator ascertained that 31 of the 56 eligible employees had, by means of authorization cards, selected the Union as their representative (R. 28; B.A. 60–61, 114–115).[2] On May 7, 1964, Tobin and the Union entered into a collective-bargaining agreement to run until March 6, 1967, subject to reopening with respect to wages, upon notice given 60 days prior to March 1, 1965 (R. 28–29; B.A. 62, 116–130). The agreement recognized the Union as the exclusive representative of the employees and provided for the checkoff of union dues (B.A. 116, 124). During December 1964, Gerald Greenfield,

[1] Meat Cutters, Packinghouse Workers & Food Handlers, District Union No. 657, Amalgamated Meat Cutters and Butcher Worker Workmen of North America, AFL–CIO.

[2] "R." references are to the transcript of record in the court below. "B.A." references are to the appendix to the Board's brief below.

president of the Union, notified Tobin that the Union desired to reopen the subject of wages (R. 26; B.A. 64). Early in January 1965, Tobin agreed that a meeting should take place as soon as possible (R. 29; B.A. 64–65).

At about the same time, Tobin decided to cease its Miami operations and sell or lease its plant and equipment (R. 29–30; B.A. 66–67). On the afternoon of January 13, Tobin assembled the employees and told them that it planned to transfer the business to petitioner Valleydale, and F. Goodrich Wright was introduced as the new plant superintendent (R. 30–31; B.A. 25–26). Wright informed the employees that everything would remain the same, but that they would lose their seniority and would be required to fill out applications for employment, take physical examinations, and be interviewed (R. 30; B.A. 26–27).

On January 15, the Union learned that Valleydale would take over on January 18 (R. 31; B.A. 68). On January 18, Union President Greenfield wrote Valleydale that the Union was the representative of the employees and had an existing collective-bargaining contract with Tobin; a copy of the contract was enclosed (R. 31–32; B.A. 68–69, 131). Greenfield requested Valleydale to reinstate the collective-bargaining agreement and "abide by its terms," and to commence negotiations "concerning wages to become effective on March 1"; he expressed the expectation that Valleydale would "not fail to recognize us or the existence of our agreement * * *" (R. 31–32; B.A. 68–69, 131).

On January 18, Valleydale formally acquired the

business from Tobin, through a sublease of the premises and a lease of the equipment (R. 32–33; B.A. 79–92). Wright became plant superintendent, but the employees' wages and responsibilities remained the same as before (R. 32; B.A. 8–12, 14–16, 43–44). Valleydale continued to produce the same products with the same equipment, to service the same customers, and to use the Tobin label (R. 33; B.A. 24, 54). Some employees were unaware of the change in employers until they heard talk in the plant (R. 34; B.A. 8). After January 18, however, Valleydale ceased the checkoff of union dues as provided for in the contract between the Union and Tobin, although none of the employees requested it to do so (R. 33–34; B.A. 36, 48–49, 57).[3] About a week or ten days after the transfer, the employees were required to sign a statement agreeing to be probationary employees for 180 days and to follow new work rules altering their conditions of employment (R. 34; B.A. 27–28).

On January 25, Greenfield, having received no reply to his letter, visited the plant (R. 34; B.A. 69–71). Superintendent Wright refused to meet with him, stating that the Union's letter had been referred to Valleydale's attorney, who would draft a reply (R. 34; B.A. 70–71). On February 22, counsel for Valleydale replied that the Company would neither honor the contract between the Union and Tobin, nor recognize the Union. The reply letter further stated that the

[3] Several employee witnesses at the Board hearing testified that their union dues were being checked off by the employer on the date of the transfer (B.A. 11, 29, 36, 48–49, 57).

Company doubted that the Union represented a majority of its employees, and suggested that the Union seek a Board election after giving Valleydale an opportunity to establish a profitable operation. (R. 34–35; B.A. 71–73, 132–133.)

The Board found that Valleydale was the successor to Tobin, operating the same enterprise with only a change in top management; that the collective-bargaining agreement with Tobin evidenced the Union's majority status and justified a presumption that that status continued, absent a contrary showing by Valleydale; and that Valleydale had offered no evidence either to rebut the presumption of continued majority status or to establish that it had a good faith doubt as to the Union's majority. Accordingly, the Board concluded that Valleydale's withdrawal of recognition from the Union violated Section 8(a) (5) and (1) of the Act. (Pet. App. 22a–25a.) The Board ordered Valleydale, *inter alia,* to bargain with the Union, and to make the employees whole for any loss of pay or other benefits which they may have suffered as a result of the Company's unilateral changes in conditions of employment (Pet. 13a–14a, 34a–36a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. 8a–9a).

ARGUMENT

Petitioner does not contest the Board's finding, approved by the court of appeals, that it became Tobin's successor, taking over the same enterprise, including its employees, that Tobin operated (Pet. 6). Nor does petitioner appear to challenge the settled principle

under the Act that a successor employer assumes his predecessor's bargaining obligation.[4] The only question raised by the petition is whether the Board was warranted in concluding that the Union, which had been recognized by Tobin without a Board certification, represented a majority of the employees, and in presuming that its majority status continued in the absence of proof by petitioner to the contrary. The court below correctly concluded that, even if the collective bargaining agreement between the Union and Tobin did not, of itself, bind Valleydale,[5] the existence of this agreement, which was entered into following a card check by an impartial party, constituted adequate proof of the Union's majority status; and that, no less than in the case of a Board certification (see *Brooks* v. *National Labor Relations Board,* 348 U.S. 96), it could be presumed that such status would continue in the absence of proof of facts by Valleydale which would justify a contrary conclusion. Moreover, the present decision is consistent with the decisions of the other courts of appeals which have considered the same issue. *Makela Welding, Inc.* v. *National Labor Relations*

[4] *Makela Welding, Inc.* v. *National Labor Relations Board,* 387 F. 2d 40, 46 (C.A. 6); *National Labor Relations Board* v. *Tempest Shirt Mfg. Co.*, 285 F. 2d 1, 4 (C.A. 5); *Overnite Transportation Co.* v. *National Labor Relations Board*, 372 F. 2d 765 (C.A. 4), certiorari denied, 389 U.S. 838; *National Labor Relations Board* v. *McFarland*, 306 F. 2d 219 (C.A. 10); *National Labor Relations Board* v. *Armato*, 199 F. 2d 800 (C.A. 7).

[5] The Board found it unnecessary to decide that issue "in view of the agreement's expiration date of March 6, 1967, and the Board's affirmative bargaining order herein" (Pet. App. 12a, n. 1).

Board, 387 F. 2d 40, 46 (C.A. 6); *National Labor Relations Board* v. *Master Touch Dental Laboratories,* 405 F. 2d 80, 82 (C.A. 2); *Shamrock Dairy, Inc.,* 119 NLRB 998, and 124 NLRB 494, enforced *sub nom. International Brotherhood of Teamsters* v. *National Labor Relations Board,* 280 F. 2d 665 (C.A.D.C.). There is thus no occasion for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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